Editor's note: 89 I.D. 642; Reaffirmed on sua sponte reconsideration, by order dated Jan. 10, 1983 -- §ee 69 IBLA 246A & B below; Reconsideration denied, relief from judgment denied by order dated January 13, 1983; Overruled to the extent inconsistent with 72 IBLA 218 (April 25, 1983)

NORTHWAY NATIVES, INC.
DOYON LIMITED

IBLA 82-1126 Decided December 17, 1982

Appeal from easement reservations across Native-selected lands reserved by the Bureau of Land Management on behalf of the Secretary under authority of section 17(b) of the Alaska Native Claims Settlement Act.

Affirmed in part, modified in part.

1. Alaska Native Claims Settlement Act: Easements: Review

   When an interested party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. A decision to reserve easements must be affirmed as long as it is supported by a rational basis.

2. Alaska Native Claims Settlement Act: Easements: Review

   The failure of BLM to include in the predecision record or the easement reservation decision itself all factors bearing on its selection does not render the decision arbitrary and capricious. The lack of a formal requirement that BLM fully justify its decisions in writing does not mean that BLM may reserve public

easements across Native-selected lands without abiding by the selection criteria set forth in the Alaska Native Claims Settlement Act and Departmental regulations, or that BLM need not be able to document a rational basis for its decision to reserve or not reserve an easement.

3. Alaska Native Claims Settlement Act: Easements: Present Existing Use

Pursuant to 43 CFR 2650.4-7(a)(3), the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. In light of the detailed concern repeatedly expressed in the easement regulations about controlling the "uses" of public easements, it makes little sense to regard the "primary standard" for determining which public easements are reasonably necessary as nothing more than favoring trails, regardless of their purpose, which have recency of use. The most reasonable interpretation of the "present existing use" requirement is that easements substantially conform to existing uses and that such evidence of use be recent.

4. Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Present Existing Use

The regulations contain safeguards to guarantee the public access to the public domain via easements across Native-selected lands so that other than present existing uses of the public domain may be enjoyed. At 43 CFR 2650.4-7(a)(3) it is provided that a public easement may be reserved absent a demonstration of present existing use if, among other things, there is no reasonable alternative route available or if the public easement is for access to an isolated tract or area of publicly owned land.

5. Alaska Native Claims Settlement Act: Easements: Generally

> There is no requirement in the Alaska Native Claims Settlement Act easement regulations that all of the standard uses described for 25-foot wide trails be allowed in every easement reservation. To the contrary, the regulations specifically permit variances from standard uses "when justified by special circumstances." 43 CFR 2650.4-7(a)(4). In this case, the evidence supports the use of easement 14 for "travel by foot, dogsleds, [and] animals" (43 CFR 2650.4-7(b) (2)(i)), but the record does not support use by "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)." Id.

APPEARANCES: James Q. Mery, Esq., Fairbanks, Alaska, for appellants; M. Francis Neville, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HORTON

Northway Natives, Inc. (Northway), and Doyon Limited (Doyon) (appellants), are, respectively, a Native village corporation and a Native regional corporation established under authority of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. II 1978). They have appealed from a decision of the Bureau of Land Management (BLM) (appellee), reserving to the United States two easements, EIN 5 C5 L (easement 5) and EIN 14 C5 L (easement 14), across lands selected by appellants pursuant to land selection rights under the Act. The easements were reserved by BLM under authority of section 17(b) of ANCSA (43 U.S.C. § 1616(b)(1) (1976)).

The easements in question were reserved to the United States in BLM's Decision to Issue Conveyance (DIC), dated June 26, 1978. By decision dated August 24, 1979, BLM conformed the easements reserved in the DIC of June 26, 1978, to new easement regulations now codified at 43 CFR 2650.4-7. Following separate appeals to the Alaska Native Claims Appeal Board (ANCAB) from the BLM easement decisions, the cases were consolidated by ANCAB and referred to the Hearings Division for a hearing and recommended decision by an Administrative Law Judge, pursuant to 43 CFR 4.911(c). ANCAB reserved final determination of the matter to itself.

An evidentiary hearing was held in this case on June 23-24, 1981, in Northway, Alaska, by Administrative Law Judge E. Kendall Clarke. Judge Clarke issued a recommended decision on March 10, 1982, in which he concluded that BLM's easement reservations should be upheld.

ANCAB's functions and pending caseload were transferred to the Board of Land Appeals (IBLA) by Secretarial Order No. 3078, dated April 29, 1982. Interim rules to govern IBLA's disposition of cases pending before ANCAB were published June 18, 1982. See 47 FR 26390. Jurisdiction is therefore properly vested in IBLA to decide this case.

Summary of Controversy

Easements 5 and 14 were reserved by BLM across Native-selected lands in order to ensure reasonable access to public lands located north and east of the Native-selected areas. At this stage of the proceedings, appellants'

objections to the two easements may be summarized as follows: Although easement 5 may be justified as a 25-foot-wide trail easement to allow access for recreational activities on the public domain north of Native-selected lands, use of easement 5 as a 50-foot-wide heavy equipment transportation easement is unnecessary and unreasonable; easement 14 is not the most reasonable of possible alternative routes and, unless a restriction against mechanized travel is imposed in conjunction with use of easement 14, trespasses on Native-selected lands will occur (Posthearing Reply Brief, filed Nov. 30, 1981).

Legal Requirements

Section 17(b)(3) of ANCSA directs the Secretary of the Interior, after consultation, to "reserve such public easements as he determines are necessary." In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), it was held that in making easement reservations, the Secretary must adhere to the specific selection criteria set forth in section 17(b)(1) of the Act. Section 17(b)(1) states:

> The Planning Commission [Joint Federal-State Land Use Planning Commission for Alaska established under section 17(a) of the Act] shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

Subsequent to the decision in Alaska Public Easement Defense Fund the Department published substantive regulations governing easement reservations to conform to the court's analysis of ANCSA's statutory requirements. See 43 FR 55326 (Nov. 27, 1978), codified at 43 CFR 2650.4-7. Among the regulatory requirements in the foregoing section pertinent to this appeal are the following:

> § 2650.4-7 Public easements.
>
> (a) General requirements. (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands * * * shall be reserved.
>
> * * * * * * *
>
> (3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use * * * if there is no reasonable alternative route * * *, or if the public easement is for access to an isolated tract or area of publicly owned land. * * * The natural environment and other relevant factors shall also be considered.
>
> * * * * * * *
>
> (b) Transportation easements. (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands * * * may be reserved across lands conveyed to Native corporations. * * * If public easements are to be reserved, they shall:
>
> (i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands;
>
> * * * * * * *
>
> (iv) Follow existing routes of travel unless a variance is otherwise justified;
>
> * * * * * * *

(vi) Be reserved in topographically suitable locations whenever the location is not otherwise determined by an existing route of travel * * *;

* * * * * * *

(2) Transportation easements shall be limited to roads and sites which are related to access. * * *

(i) The width of a trail easement shall be no more than 25 feet if the uses to be accommodated are for travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.);

(ii) The width of a trail easement shall be no more than 50 feet if the uses to be accommodated are for travel by large all-terrain vehicles (more than 3,000 lbs. G.V.W.), track vehicles and 4-wheel drive vehicles, in addition to the uses included under paragraph (b)(2)(i) of this section;

[1] In addition to the above, IBLA is guided by prior decisions of ANCAB in adjudicating easement selection disputes. However, most prior ANCAB decisions involving easement reservations have only addressed the limited question of "standing" to appeal. 1/ This is said to be "the first case in which a hearing has been held concerning the section 17(b) easement regulations issued in 1978" (BLM's Posthearing Brief at 2; see also Statement by BLM counsel (Tr. 14)). Still, ANCAB has articulated principles concerning "burden of proof" and "standards of review" which IBLA regards as proper and controlling in this case. In Appeal of Goldbelt, Inc., ANCAB G 80-1, decided October 9, 1981, it was held "that when an appellant appeals a BLM easement determination made pursuant to ANCSA and its enabling regulations, the burden of proof is upon the party challenging the determination to show that the determination is erroneous." Id. at 2. Further,

1/ See, e.g., Ray DeVilbiss, 6 ANCAB 290, 89 I.D. 9 (1982); Patrick J. Bliss, 6 ANCAB 181, 88 I.D. 1039 (1981); Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981). Standing is not at issue here.

Goldbelt provides that a decision to reserve easements must be affirmed "unless the appellant shows by substantial evidence that such decision was arbitrary and capricious." Id. Agency action inconsistent with statutory and regulatory easement criteria "would be arbitrary and capricious," according to Goldbelt. Id. at 4. 2/

Discussion, Findings, and Conclusions

Easement 5

The legal description of easement 5 is set forth in BLM's decision of June 26, 1978, as amended, August 24, 1979, to conform the easement reservation to new regulatory requirements, as follows:

2/ Goldbelt's reference to "substantial evidence" as the degree of proof required to establish that a decision is arbitrary or capricious merits comment. Under the Administrative Procedure Act, the scope of review prescribed for courts is that agency action shall be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A) (1976)) or if such action is "unsupported by substantial evidence" (5 U.S.C. § 706(2)(E) (1976)).

While the APA sets forth a substantial evidence test and an arbitrary-capricious test, among others, by which to judge agency action, there is doubt as to whether the tests really differ. See Davis, Administrative Law Treatise, Second Edition, § 29.00-1 (1982 Supp.). As to factual questions, the test of substantial evidence has long mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). But Davis asks, "Does what is 'reasonable' differ from what is not arbitrary or capricious? If it does, the case law since 1938 has not developed the difference." Davis, supra at 522. Rather than second-guess what ANCAB intended by including substantial evidence language in its pronouncement of an arbitrary-capricious test, we think it is clear that the rule simply means that easement decisions rendered by BLM must have a rational basis. Consistent with BLM's delegated authority from the Secretary to reserve such easements determined to be necessary, the Goldbelt rule seems to recognize the "discretionary" nature of the decision-making involved. Thus, it is fair to say that as long as the easement decision appealed is supported by a rational basis and is consistent with the selection

> (EIN 5 C5, L) An easement for an existing access trail fifty (50) feet in width from the Alaska Highway in Sec. 19, T. 16 N., R. 18 E., Copper River Meridian, easterly to public lands. The uses allowed are those listed above for a fifty (50) foot wide trail easement. [3/]

Easement 5 is depicted on various map exhibits received into evidence at the evidentiary hearing. It is most plainly shown on exhibit 2 as a continuous black line labeled "5L C5." This easement begins at the Alaska Highway and provides access to the South Fork of the Ladue River, as well as to the Ladue River drainage area generally. It follows an easterly course across lands selected by Northway and Doyon for approximately 5 miles before arriving at the western edge of public domain lands.

In his recommended decision the Administrative Law Judge made the following findings concerning easement 5: (1) The easement is reasonably necessary to guarantee the public's ability to reach public lands north and east of appellants' selected lands; (2) the alternate route proposed by appellants, viz., the Nine Mile Trail emanating from the Taylor Highway, is not a reasonable alternative route because it does not extend to portions of the South Fork of the Ladue River, where mining claims are located, and because the trail is not suitable for year-round use or heavy equipment

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fn. 2 (continued)
criteria of section 17(b)(1) of ANCSA, it should not be nullified by a reviewing board even though from the facts presented the Board might reach a different result. See NLRB v. Minnesota Mining & Manufacturing Co., 179 F.2d 323 (8th Cir. 1950).

3/ As earlier described in BLM's modified decision of Aug. 24, 1979, 50-foot-wide trail easements may be used for "travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, and four-wheel drive vehicles." See also 43 CFR 2650.4-7(b)(2)(i).

traffic; (3) the proposed 50-foot width for easement 5 is reasonable since mining operations are possible in the future for the South Fork area of the Ladue River and a wide trail is necessary to accommodate heavy equipment. Without such an easement, Judge Clarke states, "a large block of public land would be effectively closed to mineral development" (Recommended Decision at 9).

The Board agrees with the above findings and conclusions concerning easement 5 although we do so under a different interpretation of the "present existing use" standard set forth at 43 CFR 2650.4-7(a)(3). In addition, the Board notes that the recommended decision does not directly respond to a major contention raised by appellants in their posthearing brief regarding the proper scope of review. The proper scope of review is addressed first.

Appellants argue that the BLM action in this matter must be evaluated on the basis of the predecision record which was before the agency at the time it made its easement selections. Accordingly, appellants submit that evidence received at the hearing concerning mineral claims along the South Fork of the Ladue River is irrelevant in reviewing the BLM action in question because BLM's prehearing justifications made no reference to mineral activity along the South Fork. As stated by appellants:

> Claims along the South Fork of the Ladue, and testimony regarding alternate access to them, are irrelevant to the challenge of the instant easement reservation. What is relevant only is the information found in the record upon which BLM justified its easement decision. When considering this easement, BLM had no information about any mineral activity along the South Fork. No claims had been filed there until 1979. Transcript at

> p. 30. As pointed out earlier, all data used to justify this easement decision was gathered in 1975. Transcript at p. 15. This data clearly refers only to the claims and renewed interests along the Ladue River itself, which is north and perpendicular to the South Fork and McArthur Creek, which is many miles to the east.
>
> Nor was there information available which would have indicated mineral potential along the South Fork. The inventory of known mineral resource potential as depicted on one of the maps of the URA [Unit Resource Analysis] for the Forty Mile area specifically excludes the South Fork while including the Ladue. See, Transcript, Exhibit 1.
>
> Given this perspective, testimony regarding recent, meager claim staking activity along the South Fork which postdates the gathering of information by BLM and which had no part in the decision-making process, is irrelevant to challenges to the reasonableness of that decision. Thus, alternative access must be considered only in light of access to the Ladue River drainage. By removing this cloud imposed by the BLM with testimony of activity on the South Fork, it becomes clear that the BLM's dismissal of an alternate route of access to mineralized areas along the Ladue was not only unreasonable but truly arbitrary and capricious. [Emphasis in original.]

(Appellants' Posthearing Brief at 6).

The record as comprised prior to hearing supports appellants' position that BLM's justification for selecting easement 5 includes no stated reliance on known mineral activity or claims along the South Fork.

[2] In advancing the argument that the Board should evaluate BLM's easement decision on the basis of the written record compiled by BLM prior to the decision and on reasons set forth in the decision document itself, appellants refer to a memorandum opinion by former Deputy Solicitor Lindgren, dated May 23, 1975, the relevant portion of which states:

> In the exercise of his [the Secretary's] authority he must be reasonable and not arbitrary or capricious in his determinations of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973)).

82 I.D. 325, 331 (1975).

It is undoubtedly true that to the extent BLM's easement selection decisions are administratively and judicially reviewable for reasonableness, they stand a greater chance of approval if accompanied by full and complete written justifications. However, the failure of BLM to include in the predecision record or the easement reservation decision itself all factors bearing on its selection does not render the decision arbitrary and capricious. As stated by appellee:

> The BLM decision to reserve the two disputed easements is to be reviewed on the basis of the facts presented at the hearing -- not solely on the written record which existed prior to the decision. If appellants could sustain their burden of proof by merely pointing out alleged inadequacies in the pre-decision record, there would be no reason to hold a factual hearing.

(Appellee's Posthearing Brief at 3).

Appellee goes on to note that under general procedural regulations of the Office of Hearings and Appeals found at 43 CFR 4.24(a), when a matter is referred for hearing on the instructions of an appeals board, the record made before the presiding official shall be the sole basis for decision insofar as

the referred issues of fact are involved (Appellee's Posthearing Brief at 3). An exception included in the foregoing regulation allows official notice to be taken of public records of the Department of the Interior and of any matter of which the courts may take judicial notice. 4/

Notwithstanding the Deputy Solicitor's advice to the Secretary in 1975, the easement reservation regulations promulgated by the Department in 1978 do not require a detailed written justification in decisions reserving easements under authority of section 17(b) of ANCSA. 5/ The lack of a formal requirement that the BLM fully justify its decisions in writing does not mean that BLM may reserve public easements across Native-selected lands without abiding by the selection criteria set forth in the Act and Departmental regulations, or that BLM need not be able to document a rational basis for its decision to reserve or not reserve an easement. In this case, because there was not adequate documentation before ANCAB regarding BLM's decision from which to ascertain whether the decision was proper, a hearing was ordered to receive evidence concerning the basis for its decision. It should not be necessary

4/ In prior cases, ANCAB has looked to the "record as a whole," including the BLM case file and the record made before an Administrative Law Judge, in reaching its decision. Appeal of Doyon, Limited, 4 ANCAB 50, 59, 86 I.D. 692, 696 (1979).

5/ 43 CFR 2650.4-7(a)(2) provides: "In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated." The preamble comment accompanying this regulation states, however:

"In response to one comment which called for assessments in subsection (2) to be in writing, such a provision was intended and is now provided. These assessments are part of the official easement file and are available for public inspection. The concerned Native Village now has and will continue to have an opportunity to review this file before the final decisions are made. Also, the 'must' in subsection (2) is changed to `shall' to reflect the mandatory nature of this provision." 43 FR 55327 (Nov. 27, 1978).

to do this in many cases if BLM has adequately documented its easement decisions and provided that documentation for administrative review.

From the evidence adduced at the hearing and the briefs of the parties, it is clear that BLM selected easement 5 to provide access to the South Fork of the Ladue River, among other areas, not on the basis of known mineral claims or activity along the South Fork, but on the belief that the vicinity had the potential for mining. See Tr. 30-31, 202-03, 210-11. Since 1979, at least seven mining claims have, in fact, been filed along the South Fork (Tr. 48).

[3] Appellants contend that although easement 5 is reserved along an existing trail, the trail has never been used to haul heavy mining equipment. The contention seeks to prove that easement 5 is not "reasonably necessary" on its face since the primary standard for determining which easements are reasonably necessary for access "shall be present existing use." 43 CFR 2650.4-7(a)(3). "Present existing use" is defined at 43 CFR 2650.0-5(p) as:

> [U]se by either the general public which includes both Natives and non-Natives alike or by a Federal, State, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. Past use which has long been abandoned shall not be considered present existing use.

Appellee interprets the "present existing use" standard as requiring the mere finding of a trail in use before December 18, 1976. According to

this theory, the standard does "not establish the uses to be allowed on the easement" (Appellee's Reply Brief at 7).

Judge Clarke adopted appellee's interpretation, noting that the reservation of easement 5 for future mining purposes along a trail not formerly used for access to mining was, nevertheless, "consistent with the Congressional intent to guarantee a full right of public use and access" (Recommended Decision at 9).

The Board rejects the interpretation given to the Department's easement regulations by appellee and the Administrative Law Judge. We hold it is contrary to the express and implied purposes of the easement selection criteria to say that whenever an existing trail of any sort can be located, it is thereby eligible for reservation for a markedly different use. Present existing use cannot reasonably be construed to mean, in effect, future possible use.

It is a constant theme running through the easement regulations that where it is necessary to reserve a right-of-way across Native-selected lands to provide access to the public domain, their lands shall be protected to the maximum extent possible from change in use. Thus, the regulations express the need to protect "Native culture, lifestyle, and subsistence needs" and direct that "natural environment and other relevant factors" be considered in determining which public easements are reasonably necessary (section 2650.4-7(a)(3)); public transportation easements are to follow "existing routes of travel" as a general proposition (id. at (b)(1)(iv)),

and, where they cannot be so located, they are to be reserved in "topographically suitable locations" (id. at (b)(1)(vi)). 6/ As stated by Robert Arnold, Assistant to the State Director for ANCSA: "[T]he thrust of the regulations is clear, to minimize the impact on the lands * * *" (Tr. 65; see also Tr. 101).

In light of the detailed concern repeatedly expressed in the easement regulations about controlling the "uses" of public easements, it makes little sense to regard the "primary standard" for determining which public easements are reasonably necessary as nothing more than favoring trails, regardless of their purpose, which have recency of use. The most reasonable interpretation of the "present existing use" requirement is that easements should substantially conform to existing uses and that evidence of use be recent. Robert Arnold, who is ultimately responsible for all easement reservation decisionmaking (Tr. 64, 195), acknowledged at the hearing that BLM does not merely look to the fact of activity in studying trails for selection but that the purposes of trails are also considered (Tr. 72). 7/

6/ Regulations controlling other types of easements across Native-selected lands not here at issue are found at 43 CFR 2650.4-7(b)(3) (site easements) and 2650.4-7(c) (miscellaneous easements). These regulations also safeguard the existing uses of Native-selected lands by such measures as prohibiting site easements related to transportation from being reserved for recreational use "or other purposes not associated with use of the public easement for transportation" (section 2650.4-7(b)(3)) and permitting miscellaneous easements "in order to continue certain uses of publicly owned lands and major waterways." Id. at (c) (emphasis added).

7/ In Alaska Public Easement Defense Fund v. Andrus, supra, the court analyzed, among other things, the Department's standard for reserving easements along recreational rivers and streams "having highly significant present recreational use," as prescribed by section 5(b)(3) of Secretarial Order No. 2982, dated Feb. 5, 1976, published at 41 FR 6296 (Feb. 12, 1976). See 435 F. Supp.

[4] Notwithstanding our interpretation of "present existing use," the regulations contain safeguards to guarantee the public access to the public domain via easements across Native-selected lands absent a showing of present existing use. Section 2650.4-7(a)(3) states in pertinent part:

> However, a public easement may be reserved absent a demonstration of present existing use only if it is necessary to guarantee international treaty obligations, if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land. [8/]

In the present case, since reservation of a public easement to the South Fork of the Ladue River across Native-selected lands would be possible for the purpose of ensuring access for possible future mining activities, even without a demonstration of present existing use, it was proper that the evidentiary hearing fully examined the issue of "reasonable alternative routes." In the Board's opinion, the record supports the conclusion that

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fn. 7 (continued)
664, 678. It was obviously not necessary for the court to address whether the present use requirement of section 5(b)(3) contemplated type of use versus currency of use or both since the section expressly dealt with recreational use only. Accordingly, the issue of concern was merely "the date which has been set for ascertaining 'present recreational use.'" (The court approved the date adopted by the Secretary, Dec. 17, 1976, rejecting the Natives' contention that easements should be reserved on the basis of their use on the date ANCSA was passed.)

8/ Cf. with former easement policies and procedures published in Secretarial Order No. 2982, supra, which provided at section 4:

"[E]asements in behalf of the general public for recreation, access, transportation, utilities, airports, and aircraft landing sites will be reserved only on the basis of present existing use with the following exceptions: * * * (2) the reservation of easements to assure present and future access to all public lands and resources. These exceptions describe the only local easements in behalf of the general public to be reserved for other than present existing uses."
(Emphasis added.)

easement 5 is the only reasonable route for entering the South Fork area for future mining purposes there.

The recommended findings and conclusions by the Administrative Law Judge regarding alternate routes of travel are adopted as findings and conclusions of the Board. These are: To deny the reservation of easement 5 would force a person to travel along the Alaska Highway to a point where there is other access to the public lands which does not cross over Native-selected lands. Native-selected land extends over 60 miles along the highway. Consequently, a person would have to detour great distances to get around the Native-selected lands in order to reach the public land. The alternate route proposed by appellants, the Nine Mile Trail, is not a reasonable alternative route for several reasons. The time and distance required to reach the public lands would be much greater along the Nine Mile Trail than along easement 5. The Nine Mile Trail does not extend to the South Fork of the Ladue River where mining claims are located and where future mining operations are possible. The Nine Mile Trail is unsuitable for year-round use and it cannot be used to haul heavy equipment because it traverses steep terrain. In addition, parts of the trail are in swampy land. There is substantial evidence to support BLM's decision that easement 5 is reasonably necessary as a 50-foot-wide trail to provide access to the public lands north and east of Native-selected lands and that without easement 5 a large block of public land would be effectively closed to mineral development.

Easement 14

The legal description of easement 14 as set forth in BLM's decision of June 26, 1978, modified on August 24, 1979, is as follows:

> (EIN 14 C5, L) An easement for an existing access trail twenty-five (25) feet in width from the Alaska Highway in Sec. 11, T. 14 N., R. 19 E., Copper River Meridian, northerly to public lands. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement. [9/]

Easement 14 is depicted on exhibit 2 as a continuous black line labeled "14 L C5." It begins at the Alaska Highway near Northway Junction and traverses 2 miles of Native-selected land in a northeasterly direction before arriving at public lands adjacent to Damundtali Lake.

As with easement 5, the Administrative Law Judge concluded that easement 14 is reasonably necessary to guarantee the public's ability to reach public lands north and east of appellants' selected lands. Certain contentions made by appellants in their posthearing brief regarding easement 14 are not specifically addressed in the Recommended Decision. The Board has considered appellants' objections to easement 14 and, for reasons given below, it is concluded that the record as constituted does not support the multiple uses proposed by BLM for this easement.

9/ As earlier described in BLM's modification decision of Aug. 24, 1979, 25-foot-wide trail easements may be used for "travel by foot, dogsleds, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. Gross Vehicle Weight (GVW)." See also 43 CFR 2650.4-7(b)(2)(i).

As an initial matter, it is held that there is substantial evidence to support BLM's selection of easement 14 to serve as a trail to the publicly owned lands near Damundtali Lake. There is no dispute that prior to 1976 there was present existing use of the public lands accessed by easement 14, primarily for trapping and hunting. Further, appellee's position that there are no reasonable alternative routes to the publicly owned lands which would not cross Native-selected lands, challenged by appellants only in conclusory statements to the Board, is not directly refuted by appellants or the record as presently constituted. 10/

[4] Notwithstanding the showing of specific and present use regarding easement 14 and the publicly owned lands accessed thereby, appellants submit it is not an existing route of travel for mechanized traffic. Appellants contend that mechanized travel along easement 14 would, in fact, result in unlawful trespass on Native-selected lands adjacent to the easement corridor. Appellants state:

> 43 C.F.R. § 2650.4-7(b)(1)(vi) requires a transportation easement to be located in a topographically suitable location

10/ Appellee's assessment of the alternative route evidence is set forth at page 13 of its posthearing brief as follows:

"Although there are several existing trails from the Alaska Highway to the Damundtali Lake area which are located on the lands which have been conveyed to the appellants, there are no trails to this area located on the publicly-owned lands southeast of the Native selections. Cross-country travel through the lands east of the selections to the Damundtali Lake area is not feasible for local residents. The journey would be too long and too difficult for most people to undertake (Tr. 110, 141, 181). Furthermore, the publicly-owned lands one would have to cross are wet and swampy, making summer travel unfeasible (Tr. 166, 181). The absence of a reasonable alternative route of access on publicly-owned lands supports the BLM decision that easement 14 is reasonably necessary."

whenever there is not an existing route of travel. Proposed Easement 14 is an old Indian foot trail. Transcript at p. 114. It was established prior to snowmobile development as a recreation vehicle, for part of the trail is not negotiable by snowmobile due to the excessively steep grades. Transcript at p. 115, 140, 141. Thus, it is not an existing route of mechanized recreation traffic, and easement rationales must make a finding that the trail is compatible with the proposed uses to be permitted by the easement reservation.

The purpose of this and most ANCSA easements is to provide the public with access to publicly-owned lands located at the terminus of the easement. 43 C.F.R. § 2650.4-7(a). Easements cannot be established to provide recreational opportunities for the public on conveyed lands. Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 664, 674 (D. Alaska 1977); 43 C.F.R. § 2650.4-7(a)(7). Recreation on conveyed private lands is a trespass. But, an easement which effectively ends on Native lands because mechanized recreation type vehicles cannot pull the grades on hills leading to the public lands will encourage prohibited and unlawful public use of private lands.

Testimony has shown that snowmobiles might be able to reach the public lands, but only by utilizing far more lands than are being reserved by the easement corridor. To negotiate the steeper hills, wide "S"-type switchbacks would have to be used. Transcript at pps. 169-170. Any use of private lands outside of the easement corridor constitutes a trespass.

* * * * * * *

If the reservation of this easement is allowed, use should be restricted to travel by foot, horse or dogsled. The environment and topography are known to support these activities. The trail as it exists and proposed to be reserved prevents access to the public lands by any other mode of transportation. There is no requirement in ANCSA transportation easement regulations that all of the permitted uses be allowed. Transportation easements under 43 C.F.R. § 2650.4-7(b)(2) address only standard and maximum permitted uses and sizes. Standard sizes and uses may be varied when justified by special circumstances. 43 C.F.R. § 2650.4-7(a)(4). The special circumstances noted * * * justify the suggested variance in this situation. [Emphasis in original.]

(Appellants' Posthearing Brief at 13-15).

Appellee contends that appellants' objections to allowing mechanized travel on easement 14 are untimely and outside the scope of review in this appeal:

> The BLM particularly objects to the appellants' request to have the BLM decision modified or reversed on the basis of factual arguments raised for the first time in the post-hearing brief. * * * [I]n preparing for the hearing, the BLM had no reason to believe that the suitability of Easement 14 for mechanized travel would be an issue. * * * If BLM had fair notice that the appellants would seek to limit the use of the trail to unmechanized modes of travel, evidence would have been introduced on this issue by the BLM.

(Appellee's Posthearing Brief at 1-2).

The Board holds that it was not improper for appellants to adduce evidence at the hearing regarding an alleged unsuitability of easement 14 to accommodate snowmobile traffic. The evidentiary hearing was not preceded by any order that appellants specifically plead their claims or the nature of proof to be offered in support thereof. Rather, the hearing was held pursuant to ANCAB's order of November 20, 1980. That order merely required that a hearing be held "to resolve the issue of whether BLM erred in its decision to reserve public easements EIN 5 C5, L and EIN 14 C5, L to the United States." It is also noted that appellee did not object when appellants questioned witnesses at the hearing regarding the above issue (see Tr. 115, 141). To the contrary, appellee questioned one of its own witnesses on the same matter (Tr. 165-66). 11/ The alleged unsuitability of

11/ Correspondingly, appellee questioned appellants' witnesses concerning the suitability of easement 5 for snowmobile travel (Tr. 49-50).

easement 14 for snowmobile traffic was also raised by appellants in their opening statement, again without objection (Tr. 96). 12/

In short, appellee cannot be heard to complain about evidence not objected to at the hearing and which bears on the reasonableness of the easement decision at issue. 13/

From the Board's examination of the evidence, it must conclude that BLM's decision that easement 14 is suitable for snowmobile travel is not supported by substantial evidence. The testimony of witnesses called by appellants and appellee supports this conclusion.

Ina Albert, resident of Northway, Alaska, for 56 years, testified:

> Q. The route, the way the old Indian trail goes, is it or is it not real steep?
>
> A. Steep.
>
> Q. Yes?
>
> A. Yes.
>
> Q. You told me yesterday that in the wintertime a snowgo cannot get up there?

12/ Thus, appellee is wrong in asserting that this factual argument of appellants was "raised for the first time in the post-hearing brief."

13/ In addition, it is somewhat inconsistent for appellee to oppose appellants' proposed exclusion of evidence regarding such matters as mining activity on the South Fork and its contention that "the two disputed easements * * * be reviewed on the basis of the facts presented at the hearing" (Appellee's Posthearing Brief at 3) while arguing that evidence related to the reasonableness of easement 14 should be ignored. It was a proper use of the hearing in this case for the Administrative Law Judge to receive any and all evidence related to the reasonableness of both easement reservations.

A. No.

Q. Is that true? No snowgo?

A. No snowgo.

Q. You would have to walk?

A. Yes.

Q. Part of the way?

A. (Nodding head).

(Tr. 115).

David Stout, a storeowner residing near Northway, Alaska, called as a witness on behalf of appellee, testified on cross-examination:

Q. Mr. Stout, you're a dog musher, correct?

A. Occasionally.

Q. Occasionally? You say you run your dogs through this country around 14, not necessarily on that trail in particular, but --

A. Yes. I have been up through there with dogs.

Q. But only when you wind [14/] them up single file until you get them up over that last ridge or so into public lands?

A. Well, generally speaking, after you leave the pipeline, you have to run them single file.

Q. Rough going?

A. Uh huh.

Q. Can't get a snowgo up in there?

14/ As appears in transcript. Probably said "line."

A. You couldn't get it up that trail. If you went up another trail you could come down that trail on a snow machine.

(Tr. 141).

Danny Grangaard, a resident of Tok, Alaska, since 1965, called as a witness on behalf of appellee, testified as follows on cross-examination regarding easement 14:

Q. You said something about even though you had never been in there in the wintertime, that you thought you could get a snowgo up there?

A. Right.

Q. Even though it is very steep?

A. Yes. The trail would have to be built different. Instead of going straight up the hill, you have got to "S"-curve up.

Q. When you take the S-curve, how many feet do you think you need?

A. Your trail is a lot longer, but there's only --

Q. To get up there, you would have to go out of the present trail as it exists?

A. What do you mean, outside of it?

Q. Well, that's a 25-foot trail back up into the Damundtali Lake area. You would have to, when you're doing your 25-foot sweep, when you're doing your sweeps, you would have to sweep outside of that 25 feet?

A. Probably.

(Tr. 169-70).

[5] There is no requirement in the ANCSA easement regulations that all of the standard uses set forth at 43 CFR 2650.4-7(b)(2) be allowed in every easement reservation. To the contrary, the regulations specifically permit variances from standard uses "when justified by special circumstances." 43 CFR 2650.4-7(a)(4). We hold in this case that while the evidence supports the use of easement 14 for "travel by foot, dogsleds, [and] animals" (43 CFR 2650.4-7(b)(2)(i)), the record does not support use by "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)." Id. 15/

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of BLM to reserve easement 5 C5 L is affirmed; the decision to reserve easement 14 C5 L is modified to allow only those uses denominated in this opinion. This decision is final for the Department.

Wm. Philip Horton
Administrative Judge
Alternate Member

I concur:

Will A. Irwin
Administrative Judge

15/ The dissenting opinion states that the majority seems to rest its decision that easement 14 is not suitable for mechanized travel on grounds that "no evidence was presented to show past use of the trail by mechanized vehicles." The majority's decision is based on the uncontroverted testimony of all witnesses questioned on the matter that snowmobiles cannot negotiate easement 14 within the confines of a 25-foot-wide trail, the width limitation imposed by regulation. 43 CFR 2650.4-7(b)(2)(i).

ADMINISTRATIVE JUDGE HENRIQUES DISSENTING IN PART:

I respectfully dissent from the holding of the majority that the easement EIN 14 C5, L should be limited to travel by foot, dogsleds, and animals, and not be open to the other uses set out in 43 CFR 2650.4-7(b)(2)(i), i.e., "snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.)."

The majority seem to rest their decision on the testimony that the steepness of the trail precludes any other type of use than on foot, and that no evidence was presented to show past use of the trail by mechanized vehicles. I do not regard the lack of past use as creating "special circumstances" which justify deviation from the uses prescribed in 43 CFR 2650.4-7(b)(2)(i).

In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), the court held (syllabus):

> Public easement section of Alaska Native Claims Settlement Act was intended to preserve right of public access to lands remaining in public domain after native selection, and date of enactment was not appropriate date to be considered in reserving easements, but rather it was appropriate to reserve easement for future use.

That interpretation appears to have been followed by the Department when it promulgated the regulations relating to public easements in Alaska Native selections. 43 CFR 2650.4-7 (43 FR 55329 (Nov. 27, 1978)).

The need for reservation of easement EIN 14 C5, L was clearly established. I would not limit its use to less than all the uses set forth in the regulations.

Douglas E. Henriques
Administrative Judge

January 10, 1983

IBLA 82-1126, 69 IBLA 219	:	F 14912-A, F 14912-B, F 19155-20
NORTHWAY NATIVES, INC., DOYON LIMITED	:	Easements
	:	Decisions of December 17, 1982, reaffirmed on reconsideration

ORDER

The Board had discovered a file which constitutes part of the administrative record in the above-captioned appeal and which was not before the Board at the time it rendered its December 17, 1982 decision.1/ The Board has carefully examined the contents of this newly discovered file.

The files before the Board at the time of its December 17 decision (which were thought at the time to constitute the complete administrative record in this matter) were compared with the contents of the newly discovered file. The only significant document contained in the newly discovered file which was not also contained in the record previously considered is appellant's objections to the recommended decision.

On its own motion, the Board has reconsidered its decision of December 17, 1982, in light of the above material. Nothing contained therein moves either the majority or the dissenting member to alter any findings or conclusions set forth in the December 17, 1982 decision.

1/ The Board came across this additional file in the course of responding to an inquiry from James Q. Mery, counsel for Doyon, who, by letter dated December 29, 1982, inquired as to why two different IBLA docket numbers (IBLA 82-1126 and IBLA 83-174) had been assigned to ANCAB docket number EC 79-3. When ANCAB's files were transported to Arlington, Virginia, the files in this case apparently became separated.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of December 17, 1982 is reaffirmed. IBLA docket number 83-174 is closed and should be disregarded.

Wm. Philip Horton
Administrative Judge
Alternate Member

We concur:

Will A. Irwin
Administrative Judge

Douglas E. Henriques
Administrative Judge

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